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Supreme Court of the United States

JAMES D. DOTSON,

Cross-Petitioner,

v.

PFIZER, INC.,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err by denying the Petitioner prospective equitable relief under the Family and Medical Leave Act because of the amount of retrospective relief in the form of liquidated damages?

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James D. Dotson ("Cross-Petitioner" or "Dotson") respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "Court of Appeals") in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 558 F.3d 284, and is reprinted in the Appendix to Petitioner's Petition for a Writ of Certiorari ("Pet. App.") at 1a – 36a. The opinion of the District Court denying Dotson's request for a prospective equitable remedy is reprinted in Pet. App. at 37a – 58a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 2009. Dotson expressly relies upon Rule 12.5 as the jurisdictional basis for this Cross-Petition for a Writ of Certiorari. Petitioner's Petition for a Writ of Certiorari was docketed on June 2, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The statutes involved in this cross-petition are found in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* The principal statute involved in this cross-petition is 29 U.S.C. § 2617(a)(1)(B), which states as follows:

Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected —

. . . .

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

STATEMENT OF THE CASE

Introduction

This cross-petition is about the proper remedial structure of the FMLA. The fundamental remedial purpose of the FMLA is to make a successful plaintiff-employee whole for all losses caused by the unlawful acts of the defendant-employer. *See Arban v. West Pub. Corp.*, 345 F.3d 390, 406 (6th Cir. 2003); *see also Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 89 (2002) (recognizing the comprehensive remedial mechanism of the FMLA as including appropriate equitable relief under 29 U.S.C. § 2617(a)(1)(B) that is tailored to the harm suffered). To effectuate this purpose, Congress created two separate and distinct categories of remedies under the FMLA – retrospective relief and prospective relief. *See* 29 U.S.C. § 2617(a)(1). This case presents the important question of whether it is proper for the courts

to deny a successful plaintiff prospective relief under the FMLA because of the amount of retrospective relief awarded in the form of liquidated damages.

Following a lengthy trial, the jury found that Petitioner Pfizer, Inc. ("Petitioner" or "Pfizer") violated the FMLA by firing Dotson in retaliation for taking FMLA-protected leave to adopt a child from a Russian orphanage. The District Court awarded Dotson retrospective relief under 29 U.S.C. § 2617(a)(1)(A) in the form of lost wages from the time of his termination to the time of the court's judgment (i.e. "back pay") and liquidated damages.

The District Court, however, erroneously denied Dotson prospective relief under 29 U.S.C. § 2617(a)(1)(B) in the form of the future pay (i.e. "front pay") that he would have received but for Pfizer's unlawful actions on the grounds that the retrospective liquidated damages award was sufficient to make Dotson whole. Likewise, the Fourth Circuit erroneously approved the District Court's use of this retrospective remedy to deny Dotson all prospective relief to which he is entitled under the FMLA. As a result, Dotson was not made whole for losses caused by Pfizer's unlawful acts.

These holdings ignore the fundamental remedial purpose of the FMLA in failing to make successful plaintiff-employees whole for losses caused by the unlawful acts of defendant-employers. If this Court grants Pfizer's Petition for a Writ of Certiorari, it should also review the lower courts' decisions to that Congress did not intend for courts to deny a successful plaintiff-employee the right to be made whole by awarding only retrospective relief instead of awarding the separate and distinct category of prospective relief provided for by the FMLA.

Background

Dotson began his career with Pfizer in 1988 and rose rapidly through its corporate ranks. JA 910, 913-21, 1979, 2754-58.[1] Indeed, Dotson rose from an entry-level sales position to District Manager in 1991, Director of Management Training and Development in 1997, Regional Manager in 1998, Institutional Healthcare Account Manager ("IHAM") in 2002, and Regional Account Manager in Pfizer's National Healthcare Organization ("NHO") in 2003. JA 913-21, 2754-58. His compensation kept pace, rising to more than $232,000.00 at the time of his wrongful termination. JA 2626R-26S, 2776-77, 2995-97. When terminated, Dotson had also accrued a ***guaranteed***, lump sum retirement annuity totaling $1.37 million. JA 2626DD-26EE, 2777, 3079, Proscia Dep. 90-101, 105, 110-11.[2]

Dotson excelled while employed by Pfizer. JA 912-14, 916, 920-25, 931-39, 2754-58. Indeed, Dotson was asked to work directly with the President of Pfizer's Pharmaceutical Group, and he received numerous letters of commendation, including letters from Pfizer's CEO, the Governor of North Carolina, the Executive Director of North Carolina's State Health Plan, and the CEO of the University of North Carolina Health System. JA 952-60, 962-63, 2660, 2662-65, 2669-70.

In February 2003, Dotson began working with the America World Adoption Association ("AWAA") to adopt

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1. References to "JA" are to the Joint Appendix filed by the parties in the Fourth Circuit on January 14, 2008.

2. This deposition transcript was admitted into evidence at trial.

a child from Russia. JA 972-73, 983-84. Dotson's family agreed to accept placement of a child with potentially serious medical problems. JA 999-1001. Dotson informed Pfizer of his plans in February 2003 and kept Pfizer's management fully apprised throughout each stage of the time-consuming adoption process. JA 975, 981-86, 995-96, 1008-09, 1046-50, 1084-86, 1210-11, 1618-21, 2218, 2633, 2645, 2716, 2801.

On August 27, 2003, the Dotsons learned that they had been selected to adopt a baby girl and would need to make at least two trips to Russia to complete the adoption. JA 725, 982-83, 999-1000, 1004, 1008, 1021, 1037-38, 1404. Dotson informed Pfizer about the two trips and other adoption-related absences that he would be required to take before traveling to Russia. JA 981-93, 1008, 1038, 1084-86, 1370-71, 1459, 1615-20, 2218. Dotson's leave was approved by Pfizer, but Pfizer never properly designated it as FMLA-protected leave.[3] JA 1370-71, 1459; Petitioner's Appellate Brief at 46.

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3. Dotson had no knowledge regarding his FMLA rights prior to traveling to Russia. JA 1050, 1367. When he attempted to ascertain his options for leave, Dotson was erroneously informed by Pfizer that he would have to "burn up" all of his vacation leave before his right to FMLA benefits would "kick in." JA 1049-50. Based on this erroneous information, Dotson never requested FMLA leave. JA 1049-50, 1211, 1364. Despite Pfizer's knowledge of Dotson's pending adoption and his need for leave, no one ever notified him of his FMLA rights, suggested that he apply for FMLA leave, or otherwise inquired to determine if the leave should be designated as FMLA-protected. JA 1048-51.

The Dotsons learned from the AWAA that adoptive parents customarily bring gifts such as clothing or medical supplies to an orphanage when adopting a child. JA 755-56, 1009, 1065, 1236-37, 1404. These supplies are needed because of the lack of resources available to the orphanages. JA 755-56, 1009-11, 1065, 1404. Adoptions are not conditioned in any way upon such gifts. JA 1010, 1014, 1368, 1370.

Dotson believed that he was in a unique position to offer much-needed medical supplies to the orphanage. JA 1010-11, 1065-66, 2814. Accordingly, Dotson requested samples (referred to by Pfizer as "starters") of the antibiotic Zithromax that were close to their expiration date (and would otherwise have been destroyed) to donate. JA 1012.

On September 4, 2003, a Pfizer employee named Bridget Jones provided Dotson with a case of Zithromax. JA 1016-20, 1040, 1489-90. Jones successfully entered the transaction into starter tracking software on her computer the same day. JA 1483, 1500. The software on Jones' computer did not reject or flag the transfer to Dotson. JA 1499-1500. Dotson tried to document the transfer from Jones himself. When his tracking software did not function properly, he immediately contacted Pfizer's Help Desk, which informed him that his computer was not programmed to document transfers. JA 1027-28, 1030-33. Dotson also mentioned the transfer to his supervisor, Chris Kennedy, who said nothing. JA 1017-18, 1030-33, 1319. Jones was never disciplined for the transfer and did not perceive that it violated Pfizer policy. JA 1497, 1507, 1890-91, 2113-14.

On September 8, 2003, while in a meeting with Kennedy and other Pfizer personnel, Dotson received word that he and his wife would need to travel to Russia on September 21, 2003, as part of the adoption process. JA 1020-21, 1036. Dotson shared the good news and his plan to donate Zithromax to the orphanage. JA 1020, 1022-24, 1411-17, 1458-59, 1808-10. Kennedy was outwardly irritated by the disruption and consequent discussions of the adoption. JA 1022-24. However, neither Kennedy nor anyone else who was present communicated any problem or policy violation associated with Dotson's plan to donate the Zithromax. JA 1022-24, 1032-34, 1411-17, 1458-59, 1808-10. In fact, one co-worker actually told Kennedy that she "was very excited that Jim was going to be able to take samples over to Russia." JA 1417. Kennedy did not respond in any way that would suggest that the donation would violate company policy. JA 1417.

On both September 5 and 11, 2003, Dotson explained to Kennedy that his computer was not programmed to enter starter transactions, asked Kennedy to manually record his receipt of the Zithromax in Pfizer's tracking system, and instructed Kennedy how to do so. JA 1024, 1027-28, 1030-33. Although Kennedy knew that Dotson was leaving for Russia ten days later, he never objected to the Zithromax transfer or donation. JA 1032-33, 1623.

On September 15-17, 2003, Dotson attended a NHO conference in Florida with Kennedy and Kennedy's direct supervisor, Patrick McElerney. JA 2224. Before the conference, Kennedy told McElerney that Dotson intended to donate Zithromax to the orphanage. JA 1033,

1328-29, 2220-21, 2224-26, 2231-32. McElerney, however, ***never*** spoke to Dotson about the starters, ***never*** advised Dotson that he was not permitted to receive or handle starters, and ***never*** advised Dotson that donating the starters would violate Pfizer's policy. JA 1033-34, 2224-26, 2231-32. Likewise, before Dotson left for Russia, Kennedy ***never*** advised Dotson that he was not permitted to receive or handle starters, ***never*** instructed Dotson to return the Zithromax, ***never*** instructed Dotson that his donation would violate Pfizer policy, and ***never*** reported Dotson's receipt of the starters to anyone at Pfizer. JA 1017-18, 1032-33, 1626-27, 1707-08.

Neither Kennedy nor McElerney reported Dotson's alleged violation of the starter policy ***before*** he left for Russia, when it was still preventable. JA 1033-34, 1626-27, 2231. In fact, McElerney admitted that he thought there was a violation of starter policy the minute that Dotson came into possession of the Zithromax. JA 2231. However, they waited until ***after*** Dotson left for Russia to report the alleged violation. JA 2203.

On November 11, 2003, a little over two weeks after Dotson returned home with his new daughter, he was informed that he was being fired for violating Pfizer's starter policy. JA 1120, 1123-27, 1130-31. Pfizer told Dotson that NHO employees were prohibited from possessing starters and that his donation created the appearance of a *quid pro quo* and put the company at risk. JA 1123-27, 1130-32, 2132, 2739, 2743.

The handling and use of starters is highly regulated by the Food and Drug Administration ("FDA") under

the Prescription Drug Marketing Act ("PDMA"), 21 U.S.C. § 353, *et seq.* JA 1838, 1851, 2656-57. To insure compliance with the PDMA, Pfizer has developed and distributed detailed and exhaustive policies and procedures for its employees to follow. JA 2656-59, 2684-2709, 2912-71. These policies prohibit transferring starters to someone who lacks the authority to possess them. JA 1889-90, 1894-95, 2112. Pfizer requires any employee who learns of a starter violation to report the violation immediately. JA 1423, 2450-51, 2658-60. The failure to report or otherwise prevent a known violation is itself a violation of Pfizer's policies. JA 2385-86, 2658-60.

Pfizer's policies, however, do ***not*** prohibit NHO personnel from possessing or distributing starters. JA 946-48, 1060, 1093-94, 1842-43, 2465-66, 2656-59, 2684-2709, 2912-71. There is ***no written*** policy that addresses NHO personnel handling starters, a fact confirmed at trial by Pfizer's Director of PDMA in Starter Administration. JA 946-48, 1060, 1093-94, 1842-43, 2656-59, 2684-2709, 2912-71. Pfizer does not train NHO personnel or sales representatives on any such policy. At trial, a Pfizer representative testified specifically that Dotson never received any such training either before or after joining NHO. JA 947-48, 1842-43, 2103, 2105.

With the exception of Kennedy, McElerney, and other individuals responsible for Pfizer's decision to terminate Dotson, not one Pfizer employee was aware of the starter prohibition that Pfizer used to justify Dotson's termination. For example, none of Dotson's NHO colleagues were aware of a policy prohibiting NHO

employees from handling starters. JA 1415-17, 1451-53, 1458-59, 1497, 1507, 1539-40, 1802-05, 1809-10. Even NHO Regional Manager John Lalley testified that he had "no idea what [Pfizer's] policy would be" regarding Dotson's receipt of starters while employed within NHO. JA 2479.

Nevertheless, Kennedy, McElerney, and the other individuals responsible for deciding to terminate Dotson testified that the policy was just "known" to exist. JA 1627, 2106-08, 2118, 2122-23, 2204, 2219, 2399-2400, 2438, 2442-43, 2451-52, 2470. Even though both Kennedy and McElerney supposedly knew of this policy and knew that Dotson planned on donating Zithromax to the Russian orphanage, neither made any attempt to stop Dotson, report him, or otherwise prevent his "violation" before he left for Russia. JA 1033, 1624-26, 1707-08, 2225-26, 2231-32. Significantly, Dotson was the only employee disciplined for his part in the alleged violation of the starter policy. JA 1497, 1507, 1543, 1577-78, 1890-91, 1894-97, 2109-14. Both Kennedy and McElerney knew of the transfer and Dotson's plans to donate the starters to the orphanage but failed to prevent or timely report the alleged violation. JA 2114, 2281, 2395. In fact, Steve Harper, a NHO Vice-President and member of the group that reached the decision to terminate Dotson, admitted that both McElerney's and Kennedy's actions also ***contributed to*** the appearance of a *quid pro quo*, yet neither was disciplined in any way. JA 2386.

Further, even though Jones transferred the starters to Dotson, Pfizer did not discipline or warn her for her part in the alleged violation. JA 1497, 1507, 1890-91, 2109-14. The same is true for Ashley Stalker, who also

transferred samples to Dotson. JA 2109-14. Put simply, even though Pfizer claimed that Dotson's actions were a serious breach of its policies, it failed to take any action against anyone else who was involved in, had knowledge of, or failed to report the alleged violation.

Based upon this compelling evidence of pretext, after an eight day trial in May 2006, the jury found that Pfizer unlawfully interfered with Dotson's FMLA rights and that Pfizer terminated Dotson in retaliation for taking FMLA-protected leave to adopt his daughter. The jury awarded Dotson back pay in the amount of $331,429.25 on his retaliation claim. After trial, Pfizer moved for Judgment as a Matter of Law ("JMOL") and Dotson moved for an award of liquidated damages, attorneys' fees, and front pay. The District Court denied Pfizer's Motion for JMOL and awarded Dotson liquidated damages, attorneys' fees, and costs; however, the District Court denied Dotson's request for front pay. Pet. App. 56a-57a. On appeal, the Fourth Circuit affirmed the District Court's denial of Pfizer's JMOL motion and Dotson's request for front pay.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve an Important Question of Federal Law Regarding The Proper Consideration that Should be Given to an Award of Liquidated Damages When Crafting Equitable Relief to Make an Aggrieved Plaintiff Whole.

A. The Fourth Circuit's Decision Directly Conflicts with the Fundamental Remedial Purpose of the FMLA.

Over the course of his fifteen-year career with Pfizer, Dotson accrued a substantial compensation package that included a salary of $200,000.00 per year, insurance benefits, stock options, 401k contributions, and a $1.37 million retirement annuity. Because of the length of his tenure with and seniority in the company, Dotson has almost no chance of ever replacing – much less exceeding – this package of salary and benefits. By failing to award damages that fully account for these losses, the District Court left Dotson with an incomplete remedy that frustrates the remedial purpose of the FMLA. The Fourth Circuit erroneously approved of the District Court's mistake.

The fundamental remedial purpose of the FMLA – as with all statutes prohibiting employment discrimination – is to ensure that a successful plaintiff is made whole for losses suffered as a result of unlawful discrimination. *Arban*, 345 F.3d at 406. To effectuate this "make whole" policy, Congress recognized that it was important to remediate both pre-judgment and post-

judgment effects of discrimination, and it did so by providing separate and distinct retrospective and prospective remedies under the FMLA. *Compare* 29 U.S.C. § 2617(a)(1)(A)(i), *with* § 2617(a)(1)(A)(ii). For example, to offset future losses, a wrongfully-terminated employee is presumptively entitled to reinstatement to his or her former position. *See Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991);[4] *Arban*, 345 F.3d at 406. Where the relationship between the parties makes reinstatement either inappropriate or unfeasible, as it does here,[5] courts award front pay to "compensate the plaintiff for lost future wages and benefits." *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 526 (5th Cir. 2001). Through an award of lost future compensation, "[f]ront pay is designed to place a plaintiff in the financial position he would have been in had he been reinstated." *Loveless v. John's Ford, Inc.*, 232 Fed. Appx. 229, 238 (4th Cir. 2007) (unpublished); *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006). This remedial principle both guides and limits a court's discretion in assessing awards of front pay. *See Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999).

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4. Although *Duke* involved claims brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, the FMLA is interpreted consistently with the ADEA and other federal acts that protect employment rights, including the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and Title VII, 42 U.S.C. § 2000e, *et seq. Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460-61 (4th Cir. 2007) (FLSA); *Burnett v. LFW Inc.*, 472 F.3d 471, 481 n.5 (7th Cir. 2006) (ADA and Title VII); *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir.2006) (ADEA).

5. The district court held that reinstatement was not an appropriate remedy. Pet. App. at 43a, n.6. Neither party challenged this finding on appeal.

Over time, however, the lower courts have departed from this explicit statutory scheme and improperly conflated these distinct remedies such that a successful plaintiff can be denied *all* prospective relief based solely upon the retrospective relief awarded by the jury. *See, e.g., Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 490-91 (5th Cir. 2007); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994); *United States E.E.O.C. v. Century Broad. Corp.*, 957 F.2d 1446, 1464, n.19 (7th Cir. 1992). In this matter, the District Court denied front pay on the grounds that the liquidated damages award made Dotson whole for all of his future losses. Pet. App. at 49a-50a. The Court of Appeals affirmed, finding that the District Court's consideration of liquidated damages in denying front pay was not an abuse of discretion. Pet. App. at 27a.

Liquidated damages, however, are an inappropriate consideration for a front pay analysis because each measure of damages serves a distinct remedial function under the FMLA. Liquidated damages are intended to serve as retrospective "compensation to the employee [for] the delay in receiving [back pay]." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir.1999); *see also Jordan v. United States Postal Serv.*, 379 F.3d 1196, 1202 (10th Cir. 2004) (agreeing that "'liquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving [lost] wages'" and stating that "[liquidated] damages under the FMLA should not be considered a 'windfall,' but rather a congressional judgment, enforced by the courts, designed to compensate employees for the obscure damages that occur when one wrongfully loses wages") (quoting *Herman*, 172 F.3d at 142);

Roy v. County of Lexington, S.C., 141 F.3d 533, 548 (4th Cir. 1998) (""'Liquidated damages'" are considered compensatory rather than punitive in nature,' *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)), and constitute 'compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Id.*).

Front pay, on the other hand, is a *prospective* remedy that targets the *post-judgment* effects of discrimination, while liquidated damages are a *retrospective* remedy that target the *pre-judgment* effects of discrimination. *See Roy*, 141 F.3d at 548; *Century Broad. Corp.*, 957 F.2d at 1464. In other words, liquidated damages are an integral component of a *back pay* award and compensate for past *losses* that otherwise would be "too obscure and difficult" to prove. *See Roy*, 141 F.3d at 548; *see also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942), *superseded on other grounds by* 29 U.S.C. § 260; *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1031 (7th Cir. 2003); *Broadus v. O.K. Indus., Inc.*, 226 F.3d 937, 943 (8th Cir. 2000); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000); *Reich* 121 F.3d at 70 n.4; *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3d Cir. 1991); *Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1540 (10th Cir. 1991).

Because each measure of damages compensates for losses during a distinct period of time (i.e. the past vs. the future), neither bears any relation to the other. *See Century Broad. Corp.*, 957 F.2d at 1464. Indeed,

there is no logically sound basis upon which to condition a plaintiff's remedy for *future* losses on the size of damages awarded for *past* losses. *See id.* (holding that retrospective remedies have no bearing on prospective relief). In short, liquidated damages are no more relevant to front pay than back pay is to reinstatement.

Congress' intent to define liquidated damages and front pay as distinct categories of damages is also confirmed by the structure of the FMLA itself. Where possible, "[t]he legislative intent of Congress is to be derived from the language ***and structure*** of the statute itself." *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 117 (4th Cir. 2001) (emphasis added) (quoting *United States v. Lanier*, 520 U.S. 259, 268 n.6 (1997)). Indeed, the dichotomy between liquidated damages and front pay is manifest under § 2617(a)(1), a provision of the FMLA in which Congress provided the following remedies:

> (A)(i) back pay;
>
> (A)(ii) prejudgment interest;
>
> (A)(iii) liquidated damages; and
>
> (B) front pay (as a substitute for reinstatement).

See 29 U.S.C. §§ 2617(a)(1)(A)-(B). This statutory structure reflects two distinct types of damages: retrospective damages (i.e., back pay) and prospective damages (i.e., front pay).

By grouping liquidated damages in a single subsection alongside two other backward-looking remedies (back pay and prejudgment interest), Congress confirmed the retrospective nature of liquidated damages. *See* 29 U.S.C. § 2617(a)(1)(A). In contrast, Congress drew a distinct line between the two measures of damages by allowing front pay under a wholly separate subsection of the FMLA that is dedicated to forward-looking remedies. *See* 29 U.S.C. § 2617(a)(1)(B). There is no textual or structural connection between these two provisions. As remedies, liquidated damages and front pay are just as distinct as the remedies of back pay and reinstatement. The fact that Congress separated the remedies and aligned them in distinct groups in the FMLA confirms the fundamental disparity between the two measures of damages.

This conclusion is equally supported by the well-settled principle that "Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995). Moreover, for more than fifty-years before passage of the FMLA in 1993, courts have recognized that liquidated damages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, are inherently *retrospective* in nature. *O'Neil*, 324 U.S. at 707; *Missel*, 316 U.S. at 583-84; *Snapp*, 202 F.3d at 933-34; *Jordan*, 379 F.3d at 1202; *Hildebrandt*, 347 F.3d at 1031; *Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir. 1999); *Roy*, 141 F.3d at 548; *Reich*, 121 F.3d at 71; *Martin*, 940 F.2d at 907; *Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n.6, 41 (1st Cir. 1990) (noting that the

Age Discrimination in Employment Act incorporated the FLSA's remedies and that liquidated damages are meant to compensate for delay in payment); *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1095-96 (D.C. Cir. 1984); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). In passing the FMLA, Congress specifically stated that the FMLA should be interpreted consistently with the FLSA. *See* S. REP. NO. 103-3, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37 ("[The FMLA's] enforcement scheme is modeled on the enforcement scheme of the FLSA . . . . The relief provided in FMLA also parallels the provisions of the FLSA."). Significantly, the FMLA's liquidated damages provision is nearly a verbatim copy of the corresponding FLSA provision with only minor non-substantive differences. *Compare* 29 U.S.C. § 2617(a)(1)(A)(iii), with 29 U.S.C. § 216(b). This history leaves no doubt that Congress intended for liquidated damages to be *retrospective* and to compensate for past losses only.

The Fourth Circuit's decision in this case leaves plaintiffs, such as Dotson, with an incomplete remedy, frustrates the remedial purpose of the FMLA, and directly conflicts with the statutory scheme created by Congress to govern remedial awards under the FMLA.

B. The Fourth Circuit's Decision also Conflicts with Settled Precedent in Other Circuits.

Even assuming that liquidated damages are an appropriate consideration, standing alone, they cannot justify denial of front pay. In so holding, the Fourth Circuit rejected well-settled precedent in several other Circuits. In affirming the District Court, the Court of Appeals noted that numerous courts have explicitly approved of using liquidated damages to limit or outright deny an award of prospective equitable relief. Pet. App. at 27a. However, every other circuit court that has approved of using liquidated damages as a factor in assessing front pay, has recognized that "liquidated damages should play ***only a very small role*** in" the assessment of front pay. *Palasota*, 499 F.3d at 491; *Price v. Marshall Erdman & Assoc., Inc.*, 966 F.2d 320, 326 (7th Cir. 1992).

The Fourth Circuit ignored this standard and instead affirmed a ruling by the District Court in which the amount of liquidated damages was ***the sole factor*** considered in denying front pay. Such a holding was plainly in error. Indeed, even where the award of liquidated damages is substantial, such an award "only makes front pay less appropriate if [the] award would be highly speculative." *Century Broad. Corp.*, 957 F.2d at 1464. As discussed in the following section, Dotson's future losses were not highly speculative. Therefore, the courts below had no basis to consider liquidated damages when assessing front pay.

C. The Fourth Circuit's Opinion Conflicts with the Decisions of Other Circuits Because the Fourth Circuit Placed the Burden on Dotson to Prove that Front Pay was Not Unduly Speculative by Construing All Uncertainty in Favor of Pfizer.

Although speculation is often invoked as a reason to deny or limit front pay, such a concern is "more imaginary than real." *Blum v. Whitco Chem. Corp.*, 829 F.2d 367, 375 (3d Cir. 1987). Courts routinely engage in similar prospective analysis "whenever lost future earnings have to be estimated, as they are routinely in personal-injury cases." *Price*, 966 F.2d at 326.

Recognizing this reality, the D.C. Circuit has held that courts "should not refuse to award front pay merely because *some* speculation about future earnings is necessary." *Barbour v. Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (emphasis in original). To do so would construe uncertainty regarding future damages in favor of the unscrupulous employer. *See Abuan v. Level 3 Comm., Inc.*, 353 F.3d 1158, 1180 (10th Cir. 2003). Here, in affirming the district court, the Court of Appeals did precisely that by construing ***all*** uncertainty in favor of Pfizer.

1. *Dotson was entitled to a presumption of continued employment with Pfizer.*

As a successful plaintiff, Dotson was entitled to a presumption that he would have stayed with Pfizer until qualifying for full retirement at age 58. Federal courts "assume, absent evidence to the contrary, that [an]

illegally discharged employee would have continued working for the employer until he or she reached normal retirement age." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 n.8 (8th Cir. 1982); *accord Morse v. S. Union Co.*, 174 F.3d 917, 927 (8th Cir. 1999); *Neufeld v. Searle Labs.*, 884 F.2d 335, 341 (8th Cir. 1989); *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Blum*, 829 F.2d at 375-76; *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *Ventura v. Fed. Life Ins. Co.*, 571 F. Supp. 48, 49-50 (N.D. Ill. 1983). Indeed, courts have awarded front pay based on nothing more than the plaintiff's stated intent to remain with the employer until ***age 70***. *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1349 (11th Cir. 2000); *see also Pollard*, 412 F.3d at 668. At trial, Dotson testified that he intended to remain with Pfizer until he qualified for early retirement at age 58.[6]

Even if Dotson had not stated his intent to do so, Dotson was entitled to a presumption that he would have remained with Pfizer until at least age 58. *MacDissi*, 856 F.2d at 1060; *Blum*, 829 F.2d at 375-76. Because Pfizer presented no credible evidence to the contrary, this presumption should have controlled and defined the length of the District Court's front pay award. *See Gibson*, 695 F.2d at 1101 n.8. By ignoring this presumption and by affirming the District Court's finding that Dotson's "age, education, and experience"

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6. Significantly, Dotson did not request front pay until the typically-cited retirement age of 65. *See Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 668 (6th Cir. 2005). Rather, he testified honestly that he intended to retire as soon as he qualified for full benefits and the $1.37 million retirement annuity. JA 2626EE. Dotson's testimony was unrebutted.

made his future with Pfizer unduly speculative, the Court of Appeals presumed that Dotson would have left Pfizer regardless of his unlawful termination. This conclusion freed Pfizer from all liability for future harm caused by its own unlawful acts, *see Abuan*, 353 F.3d at 1180, and treated Dotson's wrongful termination as an illegal harbinger of his otherwise inevitable departure. The court construed all uncertainty about the future ***against*** Dotson, in favor of Pfizer, and violated the fundamental principle that a "wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Abuan*, 353 F.3d at 1180 (quotations omitted); *accord Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265-66 (1946).

2. *Dotson would have continued his employment with Pfizer until age 58.*

All credible evidence confirmed Dotson's stated intent to remain at Pfizer until age 58. Dotson dedicated his career to Pfizer since 1988. JA 910. During his fifteen-year tenure, Dotson rose through Pfizer's corporate ranks and held a variety of management-level positions. JA 913-21. Dotson's compensation at termination confirms his success at the company. JA 2626I.

As is true with many management-level positions, Dotson often uprooted his family to accommodate his job promotions, moving his family six times over 11 years between Georgia, Maryland, New York, North Carolina, and Virginia. JA 913-21. During his tenure with Pfizer, other pharmaceutical companies approached Dotson with offers of employment, but he declined each advance without even attending an interview. JA 2626G-2626H.

Moreover, there is no evidence that Dotson *ever* voluntarily sought employment outside of Pfizer.

Similarly, nothing in Dotson's employment history provided any basis whatsoever to conclude that his future with Pfizer was uncertain. Instead, the evidence demonstrated that Dotson dedicated his career to Pfizer and intended to remain at Pfizer until his retirement. There was no credible evidence that, absent the FMLA violation, Pfizer would have fired Dotson or that he would have left the company voluntarily. In fact, given Dotson's compensation, panoply of benefits, and retirement annuity, it was unreasonable to conclude that there was any likelihood of him leaving Pfizer prior to age 58.

3. *The error in the Fourth Circuit's analysis is confirmed by its approval of the District Court's view of Dotson's employment with GSK.*

Nowhere is the District Court's error more evident than its conclusion that the uncertainty of Dotson's future with Pfizer is "supported by the fact that Dotson secured similar employment, although perhaps not entirely comparable, shortly after trial." JA 3322. In other words, the Fourth Circuit affirmed a ruling that concluded Dotson's future at Pfizer was speculative because he obtained *non-comparable* employment *after* being unlawfully terminated. This conclusion ignores the fact that the only reason Dotson sought employment with GlaxoSmithKline ("GSK") was because Pfizer unlawfully fired him. Holding Dotson's post-termination mitigation efforts against him simply adds insult to

injury. Dotson's employment with GSK demonstrated nothing more than his compliance with the legal imperative to mitigate damages. *See Rodriguez-Torres v. Caribbean Forms Mfr, Inc.*, 399 F.3d 52, 67 (1st Cir. 2005).

4. *The Fourth Circuit failed to critically review the District Court's conclusion that Dotson's prospective damages were speculative.*

Even if this Court were to consider only Dotson's loss associated with the $1.37 million retirement annuity, the Fourth Circuit's error is manifest. Indeed, there is simply no possibility that an award of $331.429.25 in liquidated damages could ever make Dotson whole for an entirely separate $1.37 million loss. An obvious rejoinder to this argument would be that the $1.37 million loss is speculative because Dotson's future at Pfizer was uncertain. *See Century Broad. Corp.*, 957 F.2d at 1464. However, as discussed above, there was no evidence that Dotson ever sought to leave Pfizer or that he was likely to do so in the future, particularly given the substantial retirement annuity that awaited him at age 58.

Further, a comparison of Dotson's pre- and post-termination compensation confirms both the fact and amount of his ongoing – as well as future – losses. Front pay represents "the difference between the earnings [the employee] would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment." *McKnight v. Gen. Motors Corp.*,

908 F.2d 104, 116 (7th Cir. 1990) (citations omitted); *see Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 557-58 (6th Cir. 2006); *Davoll*, 194 F.3d at 1144; *Downes*, 41 F.3d at 1141 n.8; *Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1098 (8th Cir. 2007) (plaintiff entitled to front pay because post-termination employment provided lower compensation); *McInnis*, 458 F.3d at 1145-46. This analysis encompasses *all* aspects of an employee's compensation, including salary, fringe benefits, *and* retirement plans. *Davoll*, 194 F.3d at 1144; *Blum*, 829 F.2d at 375-76.

Here, Dotson's ongoing and future losses are manifest. While at Pfizer, Dotson's annual compensation, including benefits, totaled approximately $232,000.00. JA 2626I, 2626W, 2626FF-2626NN. Perhaps most significant, Dotson was entitled to a guaranteed retirement annuity that would have paid him a lump sum of $1.37 million when he retired from Pfizer at age 58. JA 2626DD; Pet. App. 46a-47a.[7] In contrast, in the two years following his termination and before trial, Dotson worked as a self employed consultant and earned between $53,000 and $61,000 with no benefits. Pet. App. 46a-47a. This consulting income annualized to approximately $134,000, far short of Dotson's $200,000 salary at Pfizer. JA 2626I-2626J; Pet. App. 46a.

Even when Dotson secured full-time employment several months after trial, his compensation was substantially less than what he earned at Pfizer. In

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7. Although Dotson was fully vested in—and thus certain to receive—this benefit, he lost all right to it upon his termination. JA 2626DD-2626EE, 2776.

August 2006, GSK hired Dotson to work as a trainer. JA 3246, n.5. Even though GSK is the third largest pharmaceutical company in the world, his compensation package differed dramatically. Indeed, the District Court recognized that Dotson earned between $49,000 to $60,000 less in salary, received $16,000 per year less in insurance and 401k benefits, was granted fewer stock options, and had no possibility of a $1.37 million retirement annuity. Pet. App. at 47a. There is no aspect of Dotson's employment at GSK that was equal or superior to his position at Pfizer. Even using the District Court's figures—which do not take full account of his losses—Dotson has lost and will continue to lose at least $64,000 per year in salary and benefits. When proper account is taken of the lost retirement annuity, this figure rises to at least $154,000 per year in lost compensation between Dotson's termination and the date that he would have retired from Pfizer.[8]

This comparison starkly demonstrates the on-going damage that Dotson is suffering because of Pfizer's unlawful conduct and the lower courts' denial of front pay. These losses will continue until Dotson either receives front pay or eventually finds comparable employment, which is exceedingly unlikely.

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8. At the time of his termination, Dotson had fifteen years to retirement and stood to receive a $1.37 million retirement annuity. This annuity represented more than $90,000 per year in additional income between the time of Dotson's termination and the time he qualified for retirement.

CONCLUSION

For the reasons set forth in the opposition to Petitioner's petition for a writ of certiorari, Respondent contends that this Court should not accept this case for review. In the event that the Court grants the Petition, however, Respondent submits that, to accord fairness and complete justice in this case, the Court should also grant this Conditional Cross-Petition.

Respectfully submitted,

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